***United States Court of Appeals***

***for the Second Circuit***

# APPELLANT'S BRIEF

77-7428

77-7228 B

# United States Court of Appeals

FOR THE SECOND CIRCUIT

P/S

CALLMAN GOTTESMAN and PAUL J. PEYSER,

*Plaintiffs,*

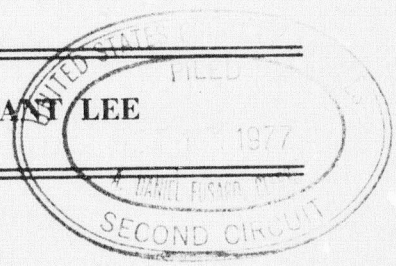
CLENDON H. LEE,

*Appellant,*

—v.—

GENERAL MOTORS CORPORATION and
E.I. DU PONT de NEMOURS & COMPANY,

*Defendants-Appellees.*




## BRIEF FOR APPELLANT LEE

CLENDON H. LEE
*Attorney for Appellant, pro se.*
One Dag Hammarskjold Plaza
New York, New York 10017
Tel. (212) 754-1430

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CALLMAN GOTTESMAN and PAUL J. PEYSER,

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*Appellant,*

—v.—

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E.I. DU PONT de NEMOURS & COMPANY,

*Defendants-Appellees.*

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## BRIEF FOR APPELLANT LEE

Appellant Lee appeals from an order entered July 13, 1977 denying his application for a legal fee pursuant to jurisdiction retained for such application at the foot of the final judgment made and entered in this action on January 23, 1976. This appeal has been consolidated with a similar appeal in this case, No. 77-7228. The order appealed from is not reported.*

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* Reported decisions herein are listed in the Table of Cases.

## Statement of Issues Presented Pursuant to Rule 28 (a) F.R.Ap.Pr.

Where by reason of du Pont's continuing and admitted violation of law and 23% stock interest during the course of conduct of massive sales of products to General Motors and prior to the ordering of divestiture (as well as prior to the completion of divestiture), an action to compel a judicial accounting by du Pont to General Motors under both state law and for violation of federal law was commenced and the "question" was "not whether this action should be stopped, but merely who ought most properly to press it forward" (268 F.2d at 197-198) and such judicial accounting was compelled and completed and the cause of action established by plaintiffs—

1. Whether in the first instance General Motors under state and federal law is required to pay legal fees and disbursements for services rendered on its behalf in the compulsory judicial accounting and in establishing the cause of action on its behalf, and

2. Whether, since it was du Pont's violation of law and course of conduct which compelled the action, du Pont should bear the ultimate burden by reimbursing General Motors or paying such fees and disbursements directly.

## Statement of the Case

*Simpliciter,* General Motors had victory thrust upon it.

In the face of violation of law, that victory was compulsory judicial accounting for violation of *state* fiduciary obligation and violation of federal antitrust laws in and of themselves, as well as one of the *means* by which *state* law was violated.

Under the "American Rule" General Motors is liable for counsel fees. Under the "American Rule" du Pont is liable for counsel fees, because its violations of law while in a position of power compelled the judicial accounting—the ". . . attack which must be met."

General Motors surely had a "first clear chance" to take its legal destiny in its own hands no later than the June 18, 1959 decision of this Court (268 F.2d 194), two years *before* the divestiture decree (366 U.S. 316, May 22, 1961). In that first interlocutory proceeding du Pont even still presumed to complain of failure of plaintiffs under old Rule 23(b) to make demand on General Motors' stockholders, all the while it was presenting in Chicago a proposal which would have permitted it to retain its 23% stock interest. Notably, Judge Clark said (at 195):

> *"No attempt* is made to attack corresponding allegetions of paragraphs 7 and 20 excusing a lack of like demand upon the *Board of Directors of General Motors"* (emphasis added)

A "last clear chance" for the General Motors Board to control its legal destiny is surely expressed by Judge Feinberg (414 F.2d 956), showing the imperative nature of a compulsory judicial accounting in the words "a real present danger of impairment of competition" which "continued to

be present" through 1961 and "until divestiture" (pp. 964-965) which was not completed for several years thereafter.

The factual details of the claims against du Pont are set forth in sufficient detail in plaintiffs' briefs in the two appeals on the merits, 414 F.2d 956 (1969) and 436 F.2d 1205 (1971) and need not be elaborated. In short, while du Pont was in violation of law and while, as the Supreme Court held (353 U.S. 586 at 606):

> ". . . du Pont purposely employed its stock to pry open the General Motors' market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics.",

the proof showed that du Pont obtained higher prices and higher margins of profits on sales to General Motors than on sales of comparable products to other automotive manufacturers.

The General Motors Board deliberately chose to have the corporation's own burden and own duty to compel the accounting by the law breaker accomplished by shareholders rather than by the corporate entity.

Moreover, it was not until after the first appeal on the merits (414 F.2d 956) that du Pont on remand then ". . . conceded that its stock interest in General Motors *constituted a violation of §7 during the damage period.*" (310 F.Supp. at 1258, emphasis added)

Plaintiffs remain convinced that in seeking to establish merely the "fact of damage" that a minimum "quantum" of single damage was established of some $40 million. This is relevant here as an indication of the magnitude of the compulsory judicial accounting which showed as a principal element that the same machinery interchangeably, and from time to time, mixed paints either with plastic globules

called "enamel" or with plastic globules called "lacquer", both of which cost the same to produce. However, the "lacquer" was sold to General Motors for about a dollar a gallon more than du Pont could obtain from other automotive manufacturers for "enamel" which they chose to buy. Du Pont was compelled to justify this conduct, while in violation of law. Label overcame substance.

Applicant Lee has submitted an affidavit containing contemporaneous, detailed verbatim diary entries showing specific individual services rendered during some 3,300 hours on some 525 days on behalf of General Motors to establish the cause of action and in compelling du Pont to account over a ten year period.

## Argument

*Alyeska Pipeline Service Company* v. *the Wilderness Society,* 421 U.S. 240, 257-258 (1975) expressly reaffirmed *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970).

*Mills* is controlling here.

General Motors and du Pont are both Delaware corporations and the forum state is New York.

Mr. Justice Harlan's Note 22 (396 U.S. at 395) among other cases cited with approval and for illustration *Saks* v. *Gamble,* 38 Del. Ch. 504, 154 A.2d 767 (1958) and *Abrams* v. *Textile Realty Corp.,* 197 Misc. 25, 93 NYS 2d 808 (Sup. Ct., N.Y.Cty., 1949).

In *Saks* Chancellor Seitz approved an award of counsel fees after dismissal of a derivative suit where defendant claimed that the action "conferred no real benefit upon Skogmo . . ." (154 A.2d at 768).

Chancellor Seitz stated (769):

"* * * that at the time plaintiff commenced the action he was not unreasonable in assuming that Skogmo did not own Associates' common stock".

The Delaware Court held (760):

"My overall conclusion is that Skogmo, assuming that it always owned Associates' common stock, engaged in conduct which justified the filing of this action and justified its continued prosecution until the interrogatories were answered by Skogmo disclosing that it owned Associates' common stock. I find it unnecessary to decide whether in fact there was doubt about this ownership. *However, it does stand undisputed that for the first time the matter has been removed from the area of possible substantial doubt. This is a benefit to the corporation.*

I therefore conclude that plaintiff is entitled to reimbursement for her attorneys and accountants for the benefit conferred". (emphasis added)

* * *

"I conclude that the benefit which was conferred upon Skogmo by this action cannot be directly measured in dollars and cents. However, I am satisfied that it was of sufficient value to justify the allowance of reasonable fees."

In *Abrams*, Referee Tuttle had stated:

"The law *cannot refuse* to recognize as beneficial full observance of the law." (97 NYS 2d at 496, emphasis added)

The absolute liability under state law is emphasized in *Alyeska*, where the Court's Note 31 (421 U.S. at 259) states:

"31. A very different situation is presented when a federal court sits in a diversity case. "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving right thereto, which reflects a substantial policy of the state, should be followed." 6 J. Moore, Federal Practice ¶ 54.77[2], pp. 1712-1713 (2d ed. 1974) (footnotes omitted). See also 2 S. Speiser, Attorneys' Fees §§ 14:3, 14:4 (1973) (hereinafter Speiser): Annotation, Prevailing Party's Right to Recover Counsel Fees in Federal Courts, 8 L.Ed.2d 894, 900-901. Prior to the decision in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), this Court held that a state statute requiring an award of attorneys' fees should be applied in a case removed from the state courts to the federal courts: "[I]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts." People of Sioux County v. National Surety Co., 276 U.S. 238, 243, 48 S.Ct. 239, 241, 72 L.Ed. 547 (1928). The limitations on the awards of attorneys' fees by federal courts deriving from the 1853 Act were found not to bar the award. *Id.*, at 243-244, 48 S.Ct., at 241. We see nothing after *Erie* requiring a departure from this result. See Hanna v. Plumer, 380 U.S. 460, 467-468, 85 S.Ct. 1136, 1141-1142, 14 L.Ed. 2d 8 (1965). The same would clearly hold for a judicially created rule, although the question of the proper rule to govern in awarding attorneys' fees in federal diversity cases in the absence of state statutory author-

> ization loses much of its practical significance in light of the fact that most States follow the restrictive American rule. See 1 Speiser §§ 12:3, 12:4."

In *Mills* the Court emphatically made clear that ". . . the determination of *what constitutes a cause of action . . .*" made "appropriate" the award of counsel fees at that time (396 U.S. at 390 n.13, emphasis added).

In 414 F.2d 956 this Court squarely made in this case the ". . . determination of what constitutes a cause of action . . ." in holding that the trial Court

> ". . . erred in deciding that a violation of Section 7 of the Clayton Act cannot support a private cause of action for money damages, and that [it] improperly restricted the scope and weight of the government's judgment in the first *du Pont* case as applied to the case at bar." (414 F.2d at 958-59)

When the reviewing Court, noting the continued violation, referred (414 F.2d at 964) at ". . . a real present danger of impairment of competition" it described the same quality of statutory standard as Mr. Justice Harlan's determination of ". . . a significant *propensity* to affect the voting process . . .". (396 U.S. at 384)

Thus, it was determined and established that the violation of Section 7 continued into and during the damage period. The violation did not stop "as of 1949" (414 F.2d at 965). Rather the "crux of the violation existed on June 3, 1957 . . . and continued to exist until after the Court decreed complete divestiture by du Pont in 1961." (414 F.2d at 964).

The establishment of the cause of action was again recognized on the second appeal where this Court stated (436 F.2d at 1211, n.21):

> ". . . On the present appeal the plaintiffs have taken the position that in view of du Pont's *established and admitted violation* of Section 7 of the Clayton Act it is no longer necessary on the issue of liability to consider the alleged Sherman Act violations." (Emphasis added)

On remand the trial court for the first time noted, "Du Pont conceded that its stock interest in General Motors constituted a *violation of § 7 during the damage period.*" (310 F.Supp. 1258, emphasis added)

Thus, the present right to recover counsel fees which clearly existed upon the decision of the first appeal was reemphasized both on remand and on the second appeal.

Whether General Motors which has struggled against establishing the cause of action elects to pursue remedies or reimbursement from du Pont does not affect applicant's rights against General Motors, nor is applicant required to pass over the primary liability of General Motors *in whose favor* the cause of action was established.

The thrust of the *Mills* decision cannot be diverted from the corporation whose interests have been served in establishing the cause of action.

In *Mills* it was not contemplated that the merged corporation or its shareholders would necessarily receive any relief whatever, the Court "imply[ing] nothing about the form of relief to which they *may* be entitled." (396 U.S. at 386, emphasis added) The Court discussed possible equitable or monetary relief in cautionary terms (396 U.S. at 386-89) and specifically held "In short, damages should be recoverable only to the extent they *can be shown.*" (396 U.S. at 389, emphasis added)

The Court also left to lower courts in the first instance, and *after* the "issue of relief has been litigated," the question of *future* and *additional* attorneys fees, declining to rule upon a further award for future services "regardless of whether petitioners are ultimately successful in obtaining significant relief." (396 U.S. at 396, n.13)

Later the Court said (396 U.S. at 396-97):

> "Whether petitioners are successful in showing a need for significant relief may be a factor in determining whether a *further* award should later be made. But *regardless of the relief granted,* private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish *a benefit to all shareholders* by providing an important means of enforcement of the proxy statute. To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that *would have had to pay them had it brought the suit.*" (Footnote omitted, emphasis added)

General Motors "would have had to pay [legal expenses] had it brought the suit." It was on monumental notice of the necessity of doing so but left the burden on plaintiffs. Accordingly, General Motors is absolutely liable for the legal fees. In addition, since du Pont's violation of law and business practices compelled a complete state and federal accounting, du Pont should bear the ultimate burden.

## CONCLUSION

The decisions denying application for legal fees should be reversed and the case remanded for determination of the amount thereof.

Respectfully submitted,

CLENDON H. LEE
*Attorney for Appellant, pro se.*
One Dag Hammarskjold Plaza
New York, New York 10017
Tel. (212) 754-1430

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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## CERTIFICATE OF SERVICE

I certify that the foregoing Brief for Appellant Lee was served upon plaintiffs and defendants General Motors Corporation and E.I.du Pont de Nemours & Company, by mailing two(2) copies of the same, first class mail, postage pre-paid, to each of the following:

Netter Dowd Ness Alfieri & Stern
Attorneys for Plaintiffs
660 Madison Avenue
New York, New York

TO:

Daniel Gribbon, Esq. and Harris Weinstein, Esq.
Covington & Burling
Attorneys for Defendant E.I.du Pont de Nemours & Co.
888 Sixteenth Street, N.W.
Washington, D.C. 20006

TO:

William A. Grier
Edward B. Wallace
Attorneys for Defendant General Motors Corporation
767 Fifth Avenue
New York, New York

BY Clendon H. Lee

Clendon H. Lee

Attorney for Appellant Lee
One Dag Hammarskjold Plaza
New York, New York 10017
Tel. (212) 754-1430

Dated:
New York, New York
October 13, 1977